

The background of the entire page is a close-up photograph of autumn leaves. The leaves are in various shades of red, orange, and yellow, with some green still visible. The lighting is soft, creating a warm and natural atmosphere. The leaves are scattered across the frame, with some in sharp focus and others blurred in the background.

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# Familymatters

Autumn 2008

Quick bites

Will you still love me when I'm 64?

Going global

Shared residence: neither all  
nor nothing

All change for child maintenance

Helping others through separation  
or divorce

[www.mills-reeve.com/familylaw](http://www.mills-reeve.com/familylaw)  
[www.divorce.co.uk](http://www.divorce.co.uk)

## Editorial

Welcome to the autumn edition of *Family Matters*.

The summer has been a busy time for us family lawyers, as we work hard to keep up with the volumes of case law that keep coming from the courts. The aftershocks of the recent seismic "big money" decisions in *Miller/McFarlane* and *Charman* are still being felt and we are receiving ever more enquiries about pre-marital agreements from those who seek to mitigate the uncertain effects of divorce law, in the event that it should ever apply. If only Sir Paul had done the same!

Our own family continues to expand. Edward Heaton has joined the team in Leeds as a senior solicitor from Withers in London and Leah Snape has come across the city from Addleshaw Goddard on her qualification as a solicitor. We welcome Andrew Moore to our Manchester office from London firm, Anthony Gold, and we are pleased that another two of our own trainees have joined the squad this year: Charlie Byrns enhances the Birmingham team, while Tricia Rooney will be making her name in Cambridge. These additions to our team mean we currently have the biggest family practice of any law firm internationally.

Our national profile continues to be high, with both myself and the other joint head of family law, David Salter, taking the stage at the annual Family Law Conference in October this year. David is president-elect of the International Academy of Matrimonial Lawyers. Nick Stone, head of our private client team and a partner in our Norwich family team, has just completed a punishing national lecture tour showcasing his skills with farming divorces. Thanks to these achievements, and to [www.divorce.co.uk](http://www.divorce.co.uk), the word is spreading: Mills & Reeve is *the* force to be reckoned with in family law.

I hope you enjoy this issue of *Family Matters*. If you have any comments or suggestions for topics you would like to see covered in future editions, as ever, do get in touch.

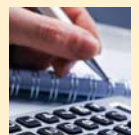
Best wishes



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## Born to be together

Kelly Robinson and Dale Wilson got married this summer, 22 years after they were born just three days apart in the maternity ward of Northampton General Hospital.

They were introduced by a mutual friend in 2006, 20 years and one day since they first "met", but only realised their shared history when their mothers got together and started talking about their births – it seems that they recovered from their deliveries in adjacent beds.

The *Daily Telegraph* reported that Miss Robinson said: "I think it is destiny. Everything fell into place when we got together. It felt like we'd known each other forever."

## Divorce and the internet

People who are going through a divorce do not just use the internet to find information from sites like [www.divorce.co.uk](http://www.divorce.co.uk). More people are using the web as a vehicle to air the details of their marital breakdown, in some cases to their detriment when the matter comes before the court.

One millionaire businessman was so annoyed with friends of his ex-wife calling him "tight" that he set up a website to set the record straight, publishing the details of his divorce settlement. He claims that he took no pleasure from doing so but "if it stops the gossip, the sneering looks and the seriously defamatory comments it will be worth it".

A British actress posted complaints about her husband on the video website, YouTube, but did not expect that this would lead to him being granted a divorce in the US on the grounds of her cruel and inhuman treatment. The judge referred to the videos as "a calculated and callous campaign" intended to pressurise her husband into settling the divorce on more favourable terms. The judge cited the videos as the primary reason for granting the divorce and upholding the pre-marital agreement.



# Quick bites

Charlotte Byrns takes a sideways look at the world of families and family law.

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## A different approach to forced marriage?

As the UK addresses the problem of forced marriage with a new legal regime, an apposite tale comes from Austria.

During her wedding at a romantic castle, Tina Albrecht jokingly told the registrar "I don't", before going on to correct herself. However, the joke was on her when she found that the wedding had to be cancelled. Under an Austrian law to prevent forced marriages, if either party replies to the important question in the negative the wedding cannot go ahead. Further, the parties cannot reschedule it for ten weeks.

Ms Albrecht reportedly said: "We had to send all our guests home and now we have to wait before we can try again. In retrospect it was probably not so funny."

## Law Commission to consider pre-marital agreements

The Law Commission has announced that it is set to examine the circumstances in which pre-marital and pre-civil partnership agreements should be enforced by the courts.

The intention is to start the project in 2009 with the aim of reporting and drawing up a draft parliamentary bill by 2012. The Law Commission will also look at so-called mid-nups or post-marital agreements entered into by couples after marriage to determine the division of their assets after divorce.

At present, pre-marital agreements are persuasive in the courts but not strictly legally binding. The recent case of the so-called "career divorcée", Susan Crossley, hit the headlines when the court looked set to uphold the agreement she entered before her fourth marriage, and the trend in the courts is to give significant weight to fairly drafted agreements.



# Will you still love me when I'm 64?

Philip Way looks at the *McCartney* case and considers how it could all have been so different.

Sadly, Lady Heather Mills McCartney's answer to Sir Paul's once rhetorical question turned out to be "no". The two-year court battle between Sir Paul and Lady McCartney finally and publicly ran its course in the spring of this year. The spectacle of Lady McCartney having poured a carafe of water over Sir Paul's immaculately turned out solicitor in court made headline news, but did the case hold any key messages for those wishing to protect their families from the financial perils of the divorce court?

## A glaring omission

Beyond a bedraggled coiffure, perhaps the second most well-known fact to emerge from the case is the absence of a pre-marital agreement. The advice always used to be that they were worth little more than the paper on which they were written, so the McCartneys must have looked on with interest as a Mr and Mrs Crossley went through the courts not long before the McCartneys' own affairs were resolved.

## Crossley

Mr and Mrs Crossley were a couple in their middle years, wealthy and previously married to other people. Prior to their brief union, Mr and Mrs Crossley had entered into a properly constituted pre-marital agreement, but on divorce Mrs Crossley wanted more. The judge gave her short shrift at a special hearing early on in the case and effectively restricted her to the terms of the pre-marital agreement.

The *Crossley* case is the latest in a series of decisions over recent years in which the courts have attached increasing weight to the existence of a pre-marital agreement. Unromantic they may be but, if properly constructed, such agreements can save a great deal of uncertainty, cost and heartache in the event that a marriage does break down.

In order to have as strong a chance as possible of binding the couple, a pre-marital agreement should be settled at least three weeks ahead of the wedding, the terms must be fair to both parties and

each must receive independent legal advice. Further, appropriate reviews should be built into the agreement, for example, on the birth of a child.

## An exaggeration

Not having entered into a pre-marital agreement, the scope of the debate between the McCartneys was broad. Lady Mills McCartney chose to represent herself at the trial while Sir Paul was represented by an experienced legal team. It is not perhaps entirely a matter of chance that, having taken advice and apparently listened to it, Sir Paul secured a decision from the court that mirrored closely the level of settlement that he had offered to give. In short, Sir Paul had offered to settle the case for about £15 million. Lady Mills McCartney wanted £125 million.

The judge found that, regrettably, much of Lady Mills McCartney's claim was exaggerated. She estimated Sir Paul's wealth to be in the region of £800 million when the judge, on the evidence, found it to be half that. She put her annual income



need at £3.25 million, whereas the judge found that income of £600,000 would be appropriate. Her case as to the contribution she had made to the marriage was exhaustive: she asserted that she had provided Sir Paul with the confidence to re-start touring, helped him write songs, dealt with set design and lighting on tours and suggested that he should have an acrylic fingernail because he had worn down his own by his extensive guitar playing. She described herself as being his full-time wife, mother, lover, confidante, business partner and psychologist.

In response, Sir Paul gave Lady McCartney full credit for the acrylic fingernail, which he referred to as being a brilliant idea.

For all the uncertainty that accompanies litigation, the fact that judges respect measured and reasonable claims is very clear from the judgment in the McCartneys' case. Having made exaggerated claims, Lady McCartney ultimately received an award very close to that which Sir Paul had offered before the court hearing.

### Enough is enough

One final perspective from which the judgment is of interest is this. Although only forty years old, and after a marriage of just four years, Lady McCartney received a capital settlement that was calculated to provide her with a secure income for the rest of her life. While her settlement was far less than that for which she had contended, it was still a substantial amount of money by most people's terms of reference. The level of the settlement had been accurately predicted by Sir Paul's legal team. To end where we began, we can only speculate as to how much less the emotional and financial cost of the McCartneys' divorce would have been if they had entered into a properly constituted pre-marital agreement.



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- A pre-marital agreement cannot bind the court in the event of a divorce, but if properly constituted can be a factor to which the court will pay great heed
- Mrs Crossley found that the court was unwilling to let her launch a full ancillary relief claim until she explained why the pre-marital agreement into which she and her husband had entered should not be upheld
- If the McCartneys had signed a pre-marital agreement, they might have been spared the spectacle of a full ancillary relief hearing in front of the world's media (although we would not have heard all about Sir Paul's acrylic fingernail!)

# Going global

David Salter reports on the perils and pitfalls of international family law.



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Everyone says that the world's a small place and getting smaller by the day. It is no longer exclusively the super rich who enjoy an international existence. This has not, however, led to a unified international approach to the legal issues arising on relationship breakdown. As family lawyers, we advise clients on a daily basis on the consequences that flow from their relationship breakdown: divorce and separation, arrangements for children, negotiation of a financial settlement and enforcement of orders.

This can be far from straightforward if matters are confined to England and Wales, but add in an international dimension and it becomes a minefield of complex legal issues.

## Issuing proceedings

It is now even easier to work and live abroad following EU initiatives encouraging free movement of workers. Further, the ability to communicate instantly with the other side of the world and the availability of reasonably priced air travel has broken down many of the barriers that used to inhibit people from living and working abroad.

One of the first issues that a family lawyer must consider when a couple is intending to divorce is the court in which proceedings should be issued. Many people have a base in more than one country and so have the

option to instigate proceedings in a foreign jurisdiction. It may be that it would be in the best interests of the husband to issue in France but in the best interests of the wife to issue in England. As you can see, it is all too easy to end up in a jurisdiction race (or forum shopping as it is sometimes called) with each party rushing to issue proceedings first as, in Europe at least, it is now almost impossible to move jurisdiction from the first place where court papers are filed. It is important that, as lawyers, we are able to react quickly in such circumstances and achieve the best result for our client.

## Children

If one parent is domiciled abroad, then this raises issues in relation to residence and contact but may also raise jurisdictional issues in relation to any children proceedings. In addition, even the slightest delay in returning a child from contact abroad could lead to fears and allegations of abduction on behalf of one parent. In all these cases, a thorough knowledge of the relevant law and procedure together with a network of reliable legal contacts abroad is essential to achieve the right result.

## Assets and finances

For the majority of people, a significant part of their wealth will be tied up in property. However, with more and more families

choosing to holiday abroad, owning a property in a foreign country is becoming increasingly common. A large share of a family's wealth may be placed outside England and Wales. This can pose a whole host of problems on relationship breakdown, from simple issues of conveyancing and more complex taxation repercussions to actually locating the asset in the first place.

The most important family law case of last year, the *Charman* family divorce, had at its centre a shadowy organisation called the Dragon Trust, based in Bermuda, where much of the family money was kept. As the super rich more often take to stashing their cash offshore, the courts and practitioners have had to step up to the challenge of dealing with jurisdictions where part of the national business plan is to entice wealthy people to invest on the back of promises that the investment will be kept out of reach. Even if information is forthcoming and allows a matrimonial claimant to obtain an order, enforcing that order and getting the money may be another matter entirely.

Another important asset to consider on relationship breakdown is a pension. This is often the parties' biggest asset other than property. Under the jurisdiction of the courts of England and Wales, it is possible to obtain a pension sharing order. This, in simple terms, enables you to have a share in your spouse's

- **International divorce cases are becoming more common**
- **Adding an international aspect to a divorce means it is essential to assess the most favourable jurisdiction for proceedings to take place**
- **Decisions often have to be made quickly as “first in time” often anchors the case**
- **It is crucial to select a solicitor with extensive experience of international work who regularly liaises with the most experienced family specialists around the world: you can find a list through the IAML at [www.iaml.org](http://www.iaml.org)**

pension on divorce. The major difficulty, in cases with an international element, is enforcement. An English pension provider will not recognise a pension sharing order made by a foreign court. This could be a major concern, especially if your husband or wife is approaching the age of retirement.

Solicitors are finding that more and more clients require, and indeed expect, advice on an international level. A significant number of our clients are based abroad or have assets abroad. The International Academy of Matrimonial Lawyers is a worldwide association of practising lawyers who are recognised by their peers as the most experienced and expert family law specialists in their respective countries, and it provides an unparalleled contact network that should be a primary port of call when faced with a complex international case.



# Shared residence: neither all nor nothing

Simon Bethel examines the greater use and acceptance of shared residence orders for children when parents separate.



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We all know that family breakdown has the potential to blight children's lives well into adulthood, but it doesn't have to be that way. Resolution (formerly the Solicitors' Family Law Association) is putting the child at the centre of its celebrations of 25 years of promoting a conciliatory approach to family law. It is now fairly rare to be involved in a dispute over children where solicitors take a combative approach. There is growing recognition that it is parental conflict, not divorce or separation per se, that has the potential to cause the greatest harm to children. Except where it is against the child's interests to do so, practitioners and the courts try to present a united front to encourage parents to work together for their children's benefit. The increase in shared residence orders is a visible part of this drive.

### When parents separate

It must be noted that the vast majority of parents manage to agree arrangements for their children without involving the courts. For those who do need assistance, however, the court has four specific powers (as set out in section 8 of the Children Act 1989):

- to make a residence order, determining with whom the child will live;
- to make a contact order, about when the child sees the parent with whom he or she does not live;
- it can make an order about a specific issue, for example, schooling, names or medical treatment; and
- it can make a prohibited steps order, for example, that the child should not be taken out of the country.

The terms "residence" and "contact" replaced the old concepts of custody and access. Despite the change of wording, progress was slow and at first most children would still be ordered to live with their mother, with their father having contact a couple of times a week. However, by the end of the last decade, there were the first stirrings of recognition that an "all or nothing" approach might not be in the best interests of the child. Fathers' lobby groups became more vocal

and raised questions about why it was necessary for one parent to be put in the position of occasional child-carer when it was the relationship between the adults that had fragmented and not either party's commitment to their children. This imbalance caused great resentment, both among parents and children.

Now the courts promote continued co-parenting after divorce much more strongly. We have seen many more fathers asking the court for equal recognition of their role in providing a home for children after divorce or separation, notwithstanding that they also have a home with their mother.

### How it works

The order tends to take the form of declaring that the children will live with both parents, then sets out how their time will be divided, either as a percentage or by days of the week (often over a fortnightly cycle). This is not altogether different on a day-to-day basis from a traditional residence and contact order, which might split the children's time in the same way. However, the difference in legal and psychological terms is significant.

The effect of a shared residence order is to place the mother and the father on an entirely equal footing, however the children's time is divided between them – neither has a right or responsibility the other does not. Both the parents and the children receive the message that neither parent is more important than the other in the children's ongoing development and that both parents have society's approval to carry on playing a full part in their lives. In the right circumstances, children have two homes with two parents, both of whom care for and love them and are equally responsible for their upbringing.

Shared residence orders are not confined to cases where parents continue to communicate cordially despite their separation. They have been made where parents are barely on speaking terms, where they live at opposite ends of the country and indeed (in a couple of cases) in different countries.

### Whether it works

There have been few research studies into the outcome of shared residence arrangements, and there is no overall consensus as to whether it is good for a child, in practical terms, to have two homes between which they move. Nor can there be – each individual child is different and what works well in one family's circumstance (or even for one child in that family) can be terribly difficult for another. Further, children have a habit of growing up and parents need to recognise that an arrangement settled when the child is three may not work so well at thirteen or even at five. The key to a successful shared residence arrangement is, as always, to put the child first. Give him or her a voice, listen to concerns and agree together to make it work. Divorce may be the end of a marriage, but parenthood is for life.

### Reading material

#### For parents and advisers:

- *Separation and divorce: helping parents to help children* by Christina McGhee, available from Resolution ([www.resolution.org.uk](http://www.resolution.org.uk)).
- *Parent Problems* by Bren Neale and Amanda Wade and *Parent Problems 2 – looking back on our parents' divorce* by Bren Neale and Jen Flowerdew, available from Young Voice ([www.young-voice.org](http://www.young-voice.org)).

#### For children:

- *Two Homes* by Claire Masurel, available widely.
- *Two of Everything* by Babette Cole, available widely.

"I had a really good childhood up until I was nine, then a classic case of divorce really affected me."

Kurt Cobain



# All change for child maintenance

Christine Bensley and Nicola Rowlings look at the impending changes to legislation regarding children.



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The Child Maintenance and Other Payments Act 2008 is now on the books. It radically amends the current child support laws and abolishes the Child Support Agency (CSA) in favour of a body called CMEC – the Child Maintenance and Enforcement Committee. But what does it mean for the payer, or receiver, of child support?

## Assessment, review and variation

Presently, the CSA calculates child maintenance on a sliding scale using the non-resident parent's (NRP) net earned income (ie, gross income less tax, national insurance and pension contributions) at a rate of 15 per cent for one child, 20 per cent for two and 25 per cent for three or more children.

If the NRP has a relevant other child living with them, a discount is applied of 15 per cent of the payable sum for one other relevant child, 20 per cent for two and 25 per cent for three or more. Further, if the NRP has overnight staying contact with the child for whom child support is being paid, a discount is applied up to a maximum of 50 per cent.

Controversially, those claiming certain benefits must apply to the CSA for child support as part of their welfare package otherwise those benefits are reduced.

Under the new scheme, CMEC will be managed by the Ministry of Justice rather than the Department of Work and Pensions, psychologically illustrating a link with the justice

system rather than the benefit system. As of now, there is no compulsion on benefits claimants to apply for child maintenance via CMEC. Another change is that, from 2011, child maintenance will be calculated using the NRP's gross weekly income (as on their tax records), rather than net, and two bands of child support will be introduced:

- For those earning up to £800 per week gross (ie, £10,400 – £41,600 per year) child support will be calculated as 12 per cent for one child, 16 per cent for two and 19 per cent for three or more children.
- For those earning between £800 and £3,000 per week gross (£41,600 – £156,000) child support will be calculated as 9 per cent for one child, 12 per cent for two and 15 per cent for three or more children.

If the NRP has a relevant other child living with them, a discount is applied of 12 per cent for one other relevant child, 16 per cent for two and 19 per cent for three. The discount to be applied for overnight staying contact remains the same.

There will be a keen emphasis on encouraging parents to make consensual arrangements and not to use CMEC. This will also apply to those currently using the CSA.

## Enforcement

Presently, the only enforcement method open to the CSA without involvement from the

courts is to deduct child maintenance straight from the pay packets of defaulting NRPs. There are other enforcement methods available to the CSA provided they obtain a liability order from a magistrates' court confirming the level of the arrears first, which can be burdensome. These include recovering monies from bank accounts, charging orders, committal to prison and disqualification from driving.

Under the new scheme, in addition to the deduction of earnings order, new powers will be introduced to allow regular child maintenance payments to be taken from the NRP's bank account and to enable arrears of maintenance to be deducted direct from the same source. These will not need the involvement of the courts in the first instance.

While liability orders will still need to be obtained to access alternative enforcement methods, a swifter administrative process will be introduced and CMEC will be able to obtain levy by distress, charging orders, driving licence removal, passport removal, imposition of a curfew and, eventually, committal to prison. There will be increased exchange of information between financial institutions and credit reference agencies to trace NRPs and collect and enforce maintenance.

The powers are quite formidable but whether it makes a difference in practice remains to be seen.



# Helping others through separation or divorce



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Hayley McCormack suggests ways of making a difference from the outside.

**What you should encourage your friend to do:** talk  
**What you can do:** listen, and don't tell, or suggest someone who can

Divorce can be an isolating experience. However, being trapped in your own head at such a time is unsustainable and it is essential to talk to someone. Tea and sympathy can go a long way to making it better but, if you do not feel able to take this on, then there are people who can do so. Try asking your local doctor's surgery for recommendations for a counsellor. If you are able to listen yourself, remember that your friend is looking for support and empathy. He or she may not be ready to deal with an opinion.

A further benefit: if your friend talks to you, it is much more likely that costs will be kept lower when he or she comes to instruct a solicitor. We find that clients with a good support network find it easier to separate the legal process of divorce from the emotional process, keeping conversations with the solicitor shorter and saving money!

**What you should encourage your friend to do:** put the children first

**What you can do:** offer to look after the children

When emotions are at their highest, it is best to find common ground early on, and wanting the best for the children is usually something everyone can agree on. Although it may be difficult to take an objective view of the children's interests in the early days, if you encourage your friend to put the kids at the centre of decisions, you will provide a framework with which it is difficult to disagree. Offering to take the children out or look after them in the home can be an excellent practical way of making a difference. Not only does it give the children a break from a tense situation but having time to oneself in this difficult situation, whether to relax or to concentrate on papers, can be a godsend.

“I just wish I could do something to help.”

**What you should encourage your friend to do:** get paperwork organised

**What you can do:** help sort out a system

Divorce inevitably causes paperwork. On top of that, your friend may be entering a new world of financial independence: the other party may have taken care of the bills or savings, or there may only previously have been joint bank accounts. A solicitor, when the time comes, will need evidence of assets, liabilities, income and outgoings in order to advise about an appropriate settlement. Specifically, you could encourage and help your friend to:

- collate financial papers;
- examine monthly expenditure;
- check with HM Revenue & Customs about whether he or she might qualify for tax credits; and
- contact the council tax office to get single occupancy discount.

**What you can encourage your friend to do:** take expert advice

**What you can do:** research the options, provide support

It is essential that your friend takes specialist advice on his or her situation. Seeing a solicitor can be daunting in these circumstances but is an essential first step in working out what the options are. Seeing a lawyer does not commit your friend to court. Mediation, collaborative law or negotiation may be the better approach and a solicitor can set out the pros and cons.

You can help here by asking around your circle of friends for recommendations and by asking your friend if he or she wants to be accompanied to the meeting or to meet for a coffee afterwards. Being a supportive friend may not feel like doing much, but it really can make the difference between a difficult and a tolerable situation.

For more information go to the UK's premier resource on divorce and separation [www.divorce.co.uk](http://www.divorce.co.uk)

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